and unreliable figures, and seem to totally ignore the fact that the property of this Company is necessary and indispensable to the successful operation of the Central System as a whole" (R., pages 105-6).

At this 1946 meeting the resolution adopted at the 1944 meeting, rejecting the Trustee's offer of purchase of South Western's properties, was unanimously reaffirmed (R., page 106).

On June 25, 1946, the plan was approved by the District Judge (R., pages 48, 105). In his opinion, affirming it, he said:

"If the lessors do not accept the proposal to acquire their lines they are, on disaffirmance, at liberty to take their properties back."

South Western had appeared specially and asked that its lease be adopted by the reorganized company without change (R., page 47). Despite their oft-expressed opinion as to the unfairness of the plan as it affected South Western, and the resolutions of the stockholders disapproving it, its officers and directors took no steps to appeal from the order of the District Judge approving the plan. No appeal was taken (R., pages 107, 48).

On July 6, 1946, a called meeting of the Board of Directors of South Western was held (R., page 106). The President stated that the purpose of the meeting was to discuss the question of the action to be taken by the South Western Board in view of the approval of the Commission's plan of reorganization by the District Court, stating that the Court had approved the plan and directed that the plan be submitted to the creditors for approval. After discussion the Directors decided that it was not necessary for the South Western to take any action until the plan had first been

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IN THE

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OCTOBER TERM, 1948.

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MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al., Petitioners,

vs.

L. O. BENTON, JR., et al., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF COUNSEL FOR THE RESPONDENTS.

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approved by the creditors and put up to South Western for acceptance or rejection (R., page 106).

So it was, therefore, that the Directors did not follow the plan which they had previously decided upon at their meeting of July 28, 1945 (R., pages 104-5), of calling a meeting of stockholders of South Western in the event of the approval of the plan by the District Judge.

On January 25, 1947, a meeting of the Board of Directors of South Western was held. The President stated that the primary purpose of the meeting was to decide what, if any, recommendation the Board would make to the stockholders with reference to either accepting or declining the offer made for the physical assets of South Western. It was decided that the Board would not take any action on the question at that meeting (R., page 107).

On March 13, 1947, there was held the annual meeting of the stockholders of South Western. This was the first meeting of the stockholders held after the approval of the plan by the District Judge. Accompanying each proxy sent to the stockholders prior to that meeting was no letter "setting forth in detail why the Board was recommending to the stockholders that the offer be rejected." There was no letter stating "that it was the intention of the holders of the proxies to vote against the acceptance of the offer" (R., page 105).

At this meeting of stockholders President Wright and the old Board of Directors were re-elected, the President having stated in his report to the stockholders' meeting that immediately following it the Board would take definite action with respect to the Commission's order, and recommend to the stockholders either an acceptance or rejection of the provisions of the plan as they affect the South Western Rail Road, giving its reasons therefor (R., page

108). The report also stated that the stockholders would be promptly advised of the action taken by the Board of Directors upon the Commission's order, and that it was proposed to hold an adjourned meeting of the stockholders on March 28, 1947, at which every stockholder would be given the opportunity to vote either in person or by proxy upon the acceptance or rejection of the provisions of the plan with respect to the purchase by the new Company of the South Western Rail Road (R., page 108).

Upon the adjournment of the stockholders meeting, a meeting of the Board of Directors was held at which a resolution was passed (two Directors absent) by the terms of which the Directors accepted the provisions of the approved plan of re-organization with respect to the acquisition of the South Western Rail Road Company, subject to the assent of said acceptance by the holders of a majority of the South Western Rail Road Company stock (R., pages 108, 116).

So it was, therefore, that although the stockholders had continuously since March, 1944, rejected this offer and although in every affirmative action taken with respect to it by the Directors, they had also rejected the plan, suddenly, on March 13, 1947, the officers and Directors, re-elected earlier that day at a stockholders meeting to which they had given no notice of their change of attitude toward the offer (R., page 108), approved the plan and proposed to submit it to a meeting of the stockholders to be held some fifteen days later.

March 19, 1947, L. O. Benton, Jr., and another stockholder requested the officers and Directors of South Western to postpone the proposed stockholders meeting of March 28, 1947, for sixty days in order that the whole situation might be presented to all the stockholders from its unfavorable and favorable angles. It was also re

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BRIEF OF COUNSEL FOR THE RESPONDENTS.

STATEMENT OF THE CASE.

South Western Rail Road Company is a railroad corporation, originally incorporated under an Act of the General Assembly of Georgia, approved December 27, 1845 (Acts 1845, page 132). There were several amendments of the charter of South Western Rail Road Company prior to the General Railroad Incorporation Law of the State,

enacted in 1892. All these amendments were Acts of the General Assembly of Georgia. There have been no amendments to the charter since the passage of the General Railroad Incorporation Law of the State.

There is no provision in the original charter of South Western Rail Road Company, or in any amendments thereof, which gives the Company any power to sell its railroad properties. The charter is silent with respect thereto. The principal office and places of business of the Company is in Bibb County, Georgia. The capital stock of this Company consists of 51,911 shares of the par value of $100.00 each, all of which is common stock. 1,440 shares of this stock are owned by Central of Georgia Railway Company, and pledged under the Consolidated Mortgage of the Central (R., page 44). The remainder of the stock of South Western (50,471 shares) is owned by over one thousand stockholders, scattered through nineteen States, the District of Columbia, and England. There are very few large stockholders (R., page 119).

South Western has no mortgage, or other liens, and no funded debt (R., page 44). It is solvent, and no bankruptcy proceedings under Section 77 of the Bankruptcy Act, have been instituted by or against it (R., page 48). Its books showed, as of December 31, 1946, the book value of its road and equipment to be $9,523,736.81, which is made up of the capital stock, $5,191,100.00, plus a write up on the books of $4,247,661.27, which represents additions and betterments put on the property by its lessees from 1869 to 1913, plus miscellaneous items of $84,975.54. The Interstate Commerce Commission valuation—cost of reproduction less depreciation, is $12,830,257.00 (R., page 50).

Its railroad mileage is about 331 miles, and its railroads lie generally between the Georgia lines and the Alabama

lines of the Central System (R., page 44). Emanating from Macon, the lines of South Western form that part of the Central of Georgia System extending from Macon through Fort Valley to Columbus, Georgia; from Macon through Fort Valley to Americus; and Albany, Georgia; and Columbia, Alabama. There joins with the latter line at Smithville, Georgia, a branch which extends to Eufaula, Alabama. Without the South Western, the Central of Georgia could not operate trains from Florida through Macon to the north and west. Without the South Western, the Central could not operate trains from the coal fields, which it touches at Birmingham and vicinity, to Savannah and the coast (R., page 100), except by traversing a route which has heavy grades and bad curves and might be impractical of operation. The Central of Georgia has used for years, as one of its primary main lines, South Western's rails from Macon to Fort Valley, to Columbus, in handling all freight movements coming through the Birmingham gateway (R., page 124).

June 24, 1869, South Western leased its railroads and their appurtenances to the Central Rail Road and Banking Company of Georgia, for and during the entire continuance of the corporate existence of the South Western under its present charter, or under any amendments, or extensions thereof. The minimum rental was Seven Per Cent. on the stock of South Western, plus corporate expenses and taxes (R., pages 44-45).

The properties of Central Rail Road and Banking Company of Georgia, were liquidated through receivership (in the early 1890's), and purchased, for the most part, by Central of Georgia Railway Company, and the leasehold estate of Central Rail Road and Banking Company of Georgia, in and to South Western under the lease above mentioned, by force of and under judicial proceedings,

passed to and became vested in Central of Georgia Railway Company. October 17, 1895, the original lease was renewed and modified for the term of 101 years, renewable in like periods upon the same terms forever, the rental being Five Per Cent. on the capital stock of South Western, plus taxes and organization expenses (R. page 45).

December 19, 1932, a Receiver was appointed for the property of Central of Georgia Railway Company by the United States District Court for the Southern District of Georgia. The Receiver adopted the lease of South Western and operated the South Western as a part of its system of railroads (R., page 45).

June 19, 1940, Central of Georgia Railway Company filed its petition in the District Court of the United States for the Southern District of Georgia, stating that it was unable to meet its debts as they matured, and that it desired to file a plan of reorganization under the provisions of Section 77 of the Federal Bankruptcy Act. Thereupon Trustees in Bankruptcy were appointed by the Court for the properties of Central of Georgia Railway Company and Merrel P. Callaway is now the sole Trustee (R. page 45).

The Trustees of the Central (June 19, 1940—[R., page 51]) entered into a contract with South Western to adopt the lease of October 17, 1895, on a modified basis, whereby the Trustees agreed to pay in lieu of rental the net income of the leased properties, and to guarantee South Western against losses and expenditures for additions and betterments in excess of $50,000.00 per annum (R., page 45).

Thus, South Western was operated by Central of Georgia's Trustee for account of South Western for the period June 19, 1940, to June 30, 1943.

The earnings for this period were:

June 19, 1940, to December 31, 1940	$ 26,506.85
Year 1941	204,707.28
Year 1942	1,260,451.32
First six months—1943	1,293,659.98
Total	$2,732,311.73
Less Federal Income Taxes (Estimated)	1,275,887.99
	$1,456,423.74
Less additions and betterments	50,424.82
Net	$1,405,998.92

(R., page 51).

This contract was terminated July 1, 1943, and thereafter the Trustee adopted the South Western lease for the duration of the Bankruptcy (R., page 45).

On January 28, 1944, Central's Trustee, Merrel P. Callaway, filed his plan of reorganization with the District Court of the United States for the Southern District of Georgia, and contemporaneously therewith filed it with the Interstate Commerce Commission, pursuant to the provisions of the Bankruptcy Act (R., page 102).

With respect to the South Western, the plan provided:

> "Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Rail Road . . . If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased line security holders, then and in that event the lease or leases of any line or lines not so acquired shall be

disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the Court, be determined by the Trustee or by the reorganization managers when they begin to function. If the leased lines are acquired, the railroads of each of the three and the personal property appurtenant thereto and all the real estate owned by each lessor, shall be conveyed to the reorganized company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Rail Road Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it as hereinafter specified."

"The debtor" referred to is the Central of Georgia Railway Company (R., page 11).

The securities proposed to be allocated to the holders of South Western Rail Road Company capital stock under the plan were: "Holders of South Western Rail Road capital stock would receive for each $1,000.00 of stock, $423.80 in new first mortgage Series A bonds, and $340.97 in new income bonds of the reorganized Company" (R., page 103).

So, the plan allocated to owners of South Western stock a total of $2,200,000.00 of First Mortgage Bonds, and $1,770,000.00 of income bonds (R., page 46); a total of approximately $3,900,000.00 in bonds, for a property capitalized at $5,191,000.00, valued on its books at $9,500,000.00 plus (R., page 50), and valued by the Interstate Commerce

Commission on a basis of cost of reproduction, less depreciation, at $12,830,257.00 (R., page 50).

Almost immediately after the publication of this plan, the stockholders of South Western met in regular annual meeting on March 9, 1944. There were represented 27,286 shares of the outstanding capital stock of the Company. The President of South Western, then and now, was and is Anton P. Wright, Esq. At that meeting he introduced a resolution which included the following: "Resolved by the stockholders of the South Western Rail Road Company that the terms of the purchase proposed by the Trustee are hereby declared to be grossly unfair and inadequate to South Western Rail Road and are hereby unhesitatingly rejected." This resolution passed by a unanimous vote, with the exception of the dissenting vote of one stockholder who owned 100 shares of stock (R., page 104).

At the next annual meeting of the stockholders of South Western, held on March 8, 1945, the resolution of the 1944 meeting was reaffirmed 23,684 to 100 (R., page 104).

On July 13, 1945, the Interstate Commerce Commission, in its report on the plan, said:

> "The properties dealt with in the plan include the properties at present leased to the debtor by the South Western Railroad Company, Augusta and Savannah Railroad, and Chattahoochee & Gulf Railroad Company. It is assumed in this plan that these properties will be acquired in some manner as a result of the acceptance of the plan by the leased line security holders; but that if the offers are not accepted by any or all of the leased lines, the leases of any such line or lines are to be disaffirmed. The exact method of acquisition, whether through purchase, merger, or

consolidation, is not at present determined but, subject to the approval of the Commission and the Court, is left to the judgment of the trustee or the reorganization managers when they begin to function, in order that it may be accomplished by a method which will be most advantageous to the reorganized company.

"Specifically, it is proposed that the railroads of each of the three leased lines and the personal property appurtenant thereto and all of the real estate owned by each shall be conveyed to the reorganized company; that each of said lessors shall waive any damages to which each lessor has become or shall become entitled to on account of any alleged breach of lease and that the South Western shall waive all claims in respect to equipment, each in consideration of the delivery to it of the new securities proposed to be allocated to it as hereinbefore specified; provided, however, that this proposal as to the Chattahoochee & Gulf Railroad Company shall be subject to withdrawal if the reorganized company shall not acquire the railroads of the South Western.

"Securities offered to the leased lines would not bear interest or dividends for any period prior to acquisition of the respective leased lines.

"If the plan provision should not be accepted as to any of the leased lines, the lease of such line, or lines, would be disaffirmed as of such time as the District Court determines that the security holders of said line have not consented to the proposals contained in this plan. Thereupon, the remedies which such leased line and its security holders would have would, it is assumed, be limited to (1) the taking back of its property covered by the rejected lease, and (2) the payment of any sums due under the terms of (fol. 100) the respective leases as modified from time to

time during the receivership and the reorganization proceedings of the debtor. While such lessor would also have a claim for damages for breach of lease upon the disaffirmance in such amount as it might establish before the Court, the debtor trustee believes that no securities of cash would be allocable for the payment of such claim because the same would be considered an unsecured claim similar to the other unsecured claims for which no provision is made in this plan" (R., pages 72-73).

The Commission approved the plan.

Immediately thereafter, on July 28, 1945, there was a called meeting of the Board of Directors of South Western. It was decided at this meeting that if the plan were approved by the District Judge, a meeting of the stockholders would be called, and that accompanying each proxy sent to the stockholders would be a letter prepared by the President and General Counsel, setting forth in detail why the Board was recommending to the stockholders that the offer be rejected. In addition, the letter would state that it was the intention of the holders of the proxies to vote against the acceptance of the offer (R., pages 104-5).

By the time the next annual meeting of the stockholders was held (March 14, 1946), the plan had not yet been approved by the District Judge. To the 1946 meeting the Directors submitted a report stating:

"The stockholders of this Company, in meeting assembled, and upon two occasions, have rejected the price offered for their property in the plan of reorganization. The offer for that property, in the opinion of your Directors, is entirely inadequate, unfair and unjust to the stockholders of this Company. The conclusions reached in the plan are based on misleading

quested that before any proposition of sale was submitted to the stockholders, that another meeting of the Board of Directors be called, at which Benton and others similarly situated might present their views both legal and factual. The President of South Western had expressed the opinion to the stockholders in a letter of March 14, 1947 (R., page 111), that under the laws of Georgia, the assent of a majority of South Western's stockholders was required for a sale of the railroad's properties.

At that time, the Interstate Commerce Commission had sent to the officers of South Western a ballot to be completed, signed, and filed with the Commission by March 28, 1947, signifying the acceptance or rejection by the South Western of the plan of re-organization, in so far as it affected it (R., pages 114, 137).

The officers and Directors refused to postpone the meeting of stockholders proposed to be held on March 28, 1947.

In this situation, Benton and another stockholder, on March 25, 1947, presented to the Honorable Mallory C. Atkinson, a Judge of the Superior Courts of Bibb County, Georgia, in which the principal office of South Western is located, a petition for injunction against the South Western, its officers and Directors, in which it was prayed:

(a) That the officers and Directors be restrained and enjoined from holding a stockholders meeting on March 28, 1947, and from submitting to such meeting the proposed plan to sell the railroad properties of South Western;

(b) That if the Court should not restrain and enjoin the holding of the stockholders meeting, and if at that meeting a mere majority of the stockholders would vote in favor of the acceptance of the plan, and the resulting

sale of all the railroad properties of South Western, that the officers and Directors of South Western be restrained and enjoined from carrying such action of the stockholders into effect, and specifically, that the officers and Directors be restrained and enjoined:

(1) From filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of the plan, and that

(2) The officers and Directors of the company be restrained and enjoined from selling to the re-organized Company, or to any one else, or any other company, all the Company's railroad properties, rights, and franchises, and that

(3) They be restrained and enjoined from executing any written instrument which might convey the fee-simple title to the properties unto the re-organized Company, or any other company, and

(4) They be specifically restrained and enjoined from doing any act in behalf of the South Western Rail Road Company which might tend to consummate the plan of re-organization of Central of Georgia Railway Company with respect to the acquisition of the properties of the South Western (R., pages 115-116).

The bases of the petition for injunction were:

(a) The properties of South Western could not be sold, under the laws of Georgia, by the vote of a mere majority of the stockholders (R., pages 111-113);

(b) The action of the Board of Directors in disobeying the repeated and almost unanimous desires of the stockholders with respect to a sale of South Western properties constituted a strong case of mismanagement (R., page 114);

(c) Any passage of the resolution of sale by the stockholders would be beyond the charter powers of the Company (R., page 114).

The petition also charged on information and belief that "the present management of the Central of Georgia Railway has for the last week had out over Georgia representatives actively soliciting votes for the ratification of the plan" (R., page 110).

Judge Atkinson signed a rule nisi, requiring the defendants to show cause on March 26, 1947, why they should not be enjoined as prayed. This hearing was held on March 26 and 27 (R., page 20). The Court announced that an order would be passed March 29 (R., page 20). The stockholders of South Western met on March 28, 1947, and assented to the offer of purchase, 30,137 shares being voted in favor, 9,057 shares against (R., page 49). The remaining 12,717 shares did not vote.

No order was passed by Judge Atkinson on March 29, the passage of such order being deferred for an additional week upon request and agreement of counsel (R., page 20).

Thereafter, upon informal request acquiesced in by counsel for both parties, the passage of the order was further deferred. (R., page 20).

On April 18, 1947, Merrel P. Callaway, as Trustee of the Central of Georgia (not a party to the State Court suit), filed with Federal Judge Scarlett of the District Court of the United States, a petition to enjoin Benton and the other stockholders from further prosecuting the State Court suit. The Federal Judge granted a temporary restraining order (R., page 8).

April 24, 1947, Judge Atkinson of the State Court, of his own motion, issued an interlocutory injunction against the

defendants in the State Court suit. He overruled the charge of mismanagement made against the defendants, and put his grant of injunction on the ground that South Western had no charter power to sell its railroad without unanimous consent of its stockholders (R., page 48; the injunctive order is shown in full, R., pages 20 et seq.).

May 26, 1947, Merrel P. Callaway, as Trustee, amended his petition in the Federal Court by bringing to the attention of that Court the injunctive order of the State Court and praying that the Federal Court adjudicate the question whether, under the laws of Georgia and the circumstances of the case, the unanimous consent of the South Western's stockholders was a condition precedent to the acceptance of the plan by the South Western and the consummation of the plan by the conveyance of its property to the reorganized Company, and, further, that the injunctive order of the Superior Court of Bibb County be annulled and declared void, and that when the plan should be confirmed by the District Court that such order be passed as would make effective the acceptance and consummation of the plan by South Western (R., pages 23-25).

The Federal Court Was Not Asked to Adjudicate the Question of Mismanagement.

Benton had filed defensive pleadings to the original Federal Court action (R., pages 9, 11). In these defensive pleadings in response to Paragraph Six (R., page 2) of the complaint, he averred:

> "The allegations of paragraph six (6) are true. However, this respondent avers that of the 30,137 shares which were permitted by the officers of South Western to vote or be voted in favor of the resolution, 6,296 shares were voted by a director of South West-

ern under proxies which had (fol. 20) been solicited by a brokerage firm employed by the management of the debtor. Such proxies, except two, were obtained by said brokerage firm prior to March 13, 1947. As to these 6,296 shares, an attorney for this respondent stated at the meeting of March 28, 1947, the following:

"'In further elucidation of my position, I want to state that it is my information—I don't state it as a fact—I want to state it is my information, those shares were obtained by solicitation of Varnedoe, Chisolm & Co., or their employes, upon the employment of the Central of Georgia Railway Co. I sought at the early part of the meeting to get an opportunity to find out and a resolution to that effect was voted down. Of course, if that is not true, somebody can tell me so now.'

"Mr. Varnedoe, a member of the said brokerage firm and Mr. T. M. Cunningham, counsel for the Trustee, were present when this statement was made. It was not denied. On behalf of this respondent and other stockholders, the officers of the Company were requested to refuse to permit these shares to be voted. The presiding officer refused this request. Your respondent avers that these shares should not have been permitted to be voted. Had that action been taken, the resolution would not have passed.

"The presiding officer also permitted the voting of other shares of stock in favor of the resolution when, as a matter of law and equity, such shares should not have been voted.

"No stockholder personally present at the meeting of March 28, 1947, voted in favor of the resolution save directors of South Western and an agent of the debtor."

In response to Paragraph Ten (R., page 4) of the Complaint, he averred:

"This respondent says that the allegations of paragraph ten (10) of the complaint are a conclusion of law, and not an allegation of fact which he is required to answer.

"He respectfully says, however, that the question of whether or not the properties of South Western Railroad Company can legally be acquired by the reorganized company or the debtor on the terms set forth in the plan by a simple majority vote of the stockholders of South Western Railroad Company is not a question of which this Honorable Court has exclusive jurisdiction.

"The plan does not provide that the properties may be acquired by a simple majority vote of the stockholders of the company. Neither does the order of this Court of June 24, 1946.

"Whether the properties of this company could be acquired by the debtor or the reorganized company on the terms set forth in the plan was left by the Commission and by this Honorable Court to the stockholders of the company to decide. Whether such acceptance on the part of the company could be based on a vote of the majority of the outstanding stock of the company, was a question as to which this respondent and other stockholders on the one hand, and the officers of the company, on the other hand, differed. That difference was placed before the Superior Court of Bibb County by this respondent by his petition of March 25, 1947, for decision at a time when this Honorable Court had no proceedings before it in which that question could be determined, even if this Honorable Court should have had jurisdiction to decide it.

(fol. 23) "The proceedings in the State Court would not have the effect of defeating or impairing the jurisdiction of this Honorable Court in the reorganization proceeding."

In response to Paragraph 14 (R., page 5) of the complaint, he averred:

"The allegations of paragraph 14 constitute a conclusion of law. Even if the allegations are a correct conclusion of law, neither the Interstate Commerce Commission nor this Honorable Court in the plan of reorganization has decided that the railroads of South Western Railroad Company shall become a part of the reorganized system of railroads of the Debtor.

"On the contrary that question was in the plan left to be decided by the shareholders of South Western. The plan distinctly provides:

> " 'If any of these properties (including South Western) shall not be acquired as a result of the acceptance of the plan by the leased-line security holders (sic), then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct.'

"The original report of the Interstate Commerce Commission recognizes that South Western's properties may not be acquired, and recognizes that South Western has the right of severance if it cares to exercise it. The reports also recognize the fact that they, as an incident to proceedings for the reorganization of the Central of Georgia Railway Company, deal with suggestions for the acquisition of South Western Railroad Company and state that no

petition for the reorganization of that company has been filed.

"The question whether the railroads of South Western Railroad Company may be acquired by the debtor or the reorganized Company on the terms set forth in the plan was left by the Commission and this Court to be determined by the stockholders of South Western. Whether the offer in (fol. 25) the plan may be accepted by the South Western by a simple majority vote of its stockholders is under its charter and other laws which may be applicable thereto, a question of law which is now being litigated in a proper forum which first assumed jurisdiction of that question. That question can be settled or decided in the State Courts without interfering with the possession or jurisdiction of this Honorable Court.

"Until this action was instituted and the restraining order granted, the Trustee, with the approval of this Court and the Commission, had merely made an offer to South Western Railroad Company which it could accept or reject as its stockholders might determine. The stockholders are in dispute as to what constitutes a valid acceptance. This dispute has been laid before a Court of the State of Georgia for determination."

He now filed objections to the allowance of the amendment, and a responsive pleading to it (R., pages 25 et seq.).

June 23, 1947, Dr. W. G. Lee and others, individually and as members of an Executive Committee of a Stockholders Protective Committee, representing more than 5,000 shares of stock of South Western, intervened in the

Federal Court action in support of the petition of L. O. Benton, Jr. (R., page 32).

On August 15, 1947, the Federal Judge, after hearings, granted a permanent injunction against Benton and the intervenors, and nullified the State Court order of April 24, 1947 (R., page 69).

An appeal was taken (September 9, 1947—R., pages 70-71).

January 13, 1948, the Circuit Court of Appeals (Judges Holmes and Lee concurring, Judge Hutcheson dissenting) reversed the judgment of the Federal District Court (R., pages 183, 193). March 15, 1948, your Honors granted the petition of the Trustee for certiorari (R., page 206).

BRIEF AND ARGUMENT.

We submit that the **prime question** in this case is:

Under the facts and the law applicable thereto, did the Bankruptcy Court have exclusive jurisdiction to determine whether the fee-simple title to the properties of South Western could be acquired by the Central on the terms set forth in the plan by a mere majority vote of the stockholders of South Western?

The question may be otherwise stated:

> "The writ of injunction shall not be granted by any Court of the United States, to stay proceedings in any Court of a State, **except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.**"
>
> Judicial Code, Section 265, 28 U. S. C. A., Section 379.

Did the bankruptcy court have jurisdiction by reason of the **express** statutory exception hereinabove emphasized, or by any **implied** exception to the general rule which is: The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State? . . . .

Preliminary to a discussion of these legal questions, it is well to note at the outset the exact language of the plan as to South Western Rail Road Company. It is:

> "Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the Southwestern Railroad Company, . . ." (R., pages 11-12).

The plan does not provide that the properties of South Western might be acquired by a simple majority vote of the stockholders of South Western. The question of stockholder authority by which the properties of South Western might be acquired by the debtor was not dealt with in the plan. When Benton instituted his suit in the State Court there was no proceeding pending in the District Court in which the question could have been determined in the District Court.

Whether the properties of South Western could be acquired by the debtor or the reorganized company on the terms set forth in the plan, was left by the Commission and by the Bankruptcy Court (the District Court) to the stockholders of the Company to decide. Whether such acceptance on the part of the Company could be based on a vote of a mere majority of the outstanding stock of the Company was a question as to which respondents and other stockholders on the one hand, and the officers of the Company on the other hand, differed. That difference was placed before a Court which had jurisdiction to determine it—the State Court of Equity of the home office of the South Western Rail Road Company—the Superior Court of Bibb County, Georgia. That difference was placed before that Superior Court by Benton in his petition of March 25, 1947, for decision at a time when the District Court had no proceedings before it in which that question could have been determined, even if the District Court had had jurisdiction to decide it on the petition of a stockholder, officer, Director, or the Company.

The South Western Rail Road Company is not in reorganization. It is perfectly solvent.

It was specifically pointed out by the Interstate Commerce Commission in the Submission, which is made a part of the record (R., page 73):

"This docket and report, **as an incident to proceedings for the reorganization of the Central of Georgia Railway Company,** deal with **suggestions** for the reorganization and acquisition of the lessors, South Western Railroad Company, Augusta and Savannah Railroad, and Chattahoochee & Gulf Railroad Company. No petitions for the reorganization of the lessors have been filed." (Emphasis ours.)

261 I. C. C. Financial Reports, page 501.

The proceedings in the State Court would not have the effect of defeating or impairing the jurisdiction of the District Court in the reorganization proceeding, for the simple reason that neither the Commission nor the District Court had sought, at the time of the institution of the State Court suit, to adjudicate the question of whether or not the properties of the South Western could legally be acquired, or by what measure or quantity of stockholder authority they could be acquired.

The plan did not provide that the debtor should or must acquire the South Western. The plan merely provided that the debtor should acquire the South Western properties "if they can be acquired on the terms hereinafter set forth" (R., pages 11-12).

The plan merely and simply authorized the debtor to make an offer to South Western for its properties. Whether or not that offer could be accepted by South Western, and if so, by what authority, was left wide open by the Commission and by the District Court, prior to the institution of the State Court suit.

That the plan merely and simply authorized the debtor to make an offer to South Western for its properties was fully recognized in a statement made by T. M. Cunningham, Esq., counsel for the Trustee of the debtor, at the stockholders' meeting of March 28, 1947, when he said:

"The plan makes an offer to you gentlemen; that is all it does."

Mr. Cunningham admitted that he made this statement, but in connection with his admission, stated: "Of course, that is not all the plan says, but that is what in substance it does say—take it or leave it" (R., page 54).

By what rule of law, known up to this time, was the Superior Court of Bibb County, Georgia, the Court of Equity of the residence of South Western, deprived of the right to adjudicate the question of whether or not the stockholders of South Western had "taken it or left it"—whether or not the stockholders of South Western could legally, under the laws of Georgia, accept the offer which had been made to them, and if so by what degree or quantity of authority?

We respectfully submit that under no case construing the Railroad Reorganization Act, decided by your Honors up to this time, has that question been answered adversely to the contentions of the respondent here.

Smith v. Hoboken R. R. Warehouse and S. S. Connecting Co., 328 U. S. 123, 66 Sup. Ct. 947, does not answer it. There the debtor operated a terminal switching railroad at Hoboken, New Jersey. The major part of its right of way and line of railroad was leased by it from Hoboken R. R. Warehouse and S. S. Connecting Company. The debtor (lessee) was in reorganization. Smith was the Trustee. The lessor moved the reorganization Court to terminate the lease. The Court granted the order, holding that the appointment of the Trustee was a breach of the terms of the lease entitling the lessor to re-enter. The Circuit Court of Appeals affirmed (150 Fed. [2d] 921). The Supreme Court reversed. The basis of the reversal is shown in division four of the opinion (328 U. S., at pages 128-9):

"But the question remains whether enforcement of the forfeiture clause would be consistent with the provisions of Section 77 (of the Bankruptcy Act) within the meaning of Section 77, sub. L. That question does not seem to have been considered by the lower Courts. Our view is that it presents problems primarily for consideration and decision by the Interstate Commerce Commission and that the reorganization Court should not have declared a forfeiture of the lease **until the question had been passed upon by the Commission.**" (Emphasis ours.)

The Commission there had not yet approved or formulated a plan of reorganization. The Court called attention to that fact, and after reviewing the necessity of the status quo being maintained until the Commission could formulate or approve a plan of reorganization, said:

"The point is that **if** the reorganization Court decreed a forfeiture **in advance of consideration of the problem by the Commission,** it interferes with the functions entrusted to the Commission under Section 77. . . . If forfeiture of leases can be decreed **without prior reference of the matter to the Commission, it may be seriously embarrassed in preparing the plan which it deems necessary or desirable for the reorganization** of the debtor. . . . We hold that the District Court erred in declaring the lease forfeited and that the judgment should be reversed and the cause removed. The District Court should stay its hand **pending a decision by the Interstate Commerce Commission on the question.**" (Emphasis ours.)

The emphasized portion of the foregoing quotation demonstrates that that case does not decide the prime question here.

In that case the reorganization Court declared a lease forfeited before the Commission could pass upon the im-

port of the lease in the formulation of a plan of reorganization. Your Honors simply instructed the reorganization Court to "stay its hand" until the Commission could pass upon the questions at issue in connection with a plan.

In our case the Commission had acted. The Commission had said to the debtor: Acquire the South Western's properties if you can. If you cannot, its lease stands disaffirmed.

In our case the Commission has considered the problems. It has approved a plan. There remained no question for consideration by the Commission.

The same distinction applies to **Thompson v. Texas Mexican Railway Company, 328 U. S. 134, 66 Supreme Court 937.**

There "Tex-Mex" sued Thompson, Trustee for "Brownsville Railroad" (St. Louis, Brownsville and Mexico Railway Company) in a Texas State Court to enjoin Brownsville and its Trustee from using certain trackage which it had been using under a trackage contract, and to recover damages for the use. The State Courts held that the trackage contract had been terminated and awarded Tex-Mex large damages. This Court granted certiorari and reversed.

In reversing, your Honors, at page 142 of the official report, alluded to Smith v. Hoboken, decided the same day, said:

> "We think that the same considerations are applicable to a determination that the trackage agreement in this case should be terminated **pending formulation of a reorganiaztion plan.** By Section 77, sub. b, the plan of reorganization may adopt or reject executory contracts of the debtor as well as unexpired leases. And the adoption of either an executory contract or of

a lease by the Trustee does not preclude a rejection of it in the plan. Moreover, trackage agreements like leases of railroad tracks and facilities are means by which railroad systems have been assembled. The retention or the sloughing off of trackage agreements may assume importance in the fashioning of a plan of reorganization by the Commission. The problem is kin to that involved in Continental Illinois National Bank and Trust Company v. Chicago, Rock Island and P. Ry. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110. In that case the Court sustained the power of the reorganization Court to enjoin under Section 77 creditors, who held collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under a power of sale in the notes, where the sale would so hinder, obstruct, or delay the plan of reorganization as would likely defeat it. The Court states, 294 U. S., at pp. 676, 679, 55 S. Ct., at page 606, that a proceeding under Section 77 is a 'special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile.' The Court concluded, in view of the complexity of the problems involved in the reorganization, **'that without the maintenance of the status quo for a reasonable length of time no satisfactory plan could be worked out.'** " (Emphasis ours.)

Here a plan had been worked out before the institution of the suit in the State Court.

And, further, on pages 142 and 144:

"We think like reasons make it important that the status quo of this trackage agreement be maintained

pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not only the interests of the two parties to the trackage agreement, but phases of the public interests as well.

"A Court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. For these and like reasons which we have discussed in Smith v. Hoboken Railroad, W. & S. C. Co., supra, we think the Court erred in holding that the trackage agreement has been or should be terminated."

And the Court concluded, page 151:

"Thus, however, the case may be viewed, the Court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had it cannot be known with certainty what issues for judicial decision will emerge. Until that time judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings."

The "appropriate administrative proceedings" in our case are concluded.

The Commission and the District Court had impliedly remitted to any competent Court for a decision the question of whether the properties of South Western might be

legally acquired, and, if so, by the exercise of what quantity or quality of corporate authority.

Is there any better forum for the determination of these questions of Georgia law than the Georgia State Courts?

Since the rendition of the judgment of the Circuit Court of Appeals in this case, three cases have been decided which will probably be urged by the petitioners as authority for their position here. The latest of these is In re Chicago, Rock Island and Pacific Railway Co. (State of Texas v. Brown et al.) (C. C. A., 7th Circuit), 168 Fed. (2d) 587, in which the Court said:

> "We have no doubt, indeed, we understand that appellant admits that under the repeated decisions of the Supreme Court, the most recent of which are Seaboard Air Line Railway Company v. Daniels, 333 U. S. 118, 68 S. Ct. 426, and Schwabacher et al. v. U. S. et al., 68 S. Ct. 958, 963, the Commerce Commission has, under the Constitution and laws of the United States, the power, the duty, 'to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system,' '(the) laws of any State to the contrary notwithstanding.' This authority exists irrespective of whether the Commission acts in pursuance of its power under the Interstate Commerce Act, or under the Acts relating to bankruptcy, for bankruptcy administration, including reorganization is, under the Constitution, equally a paramount national function. Continental Bank v. Rock Island Railway, 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110. It is immaterial that the exercise of either power conflicts with State enactments" (page 590).

Assuming, for the sake of the argument, that that is a correct statement of the law, its urging here would beg the

question. We are not concerned now with the question of what power, duty and authority the "Commerce Commission" might have exercised. We are only concerned with the legal effect of the power and authority which was exercised. We do not seek to avoid the order of the Commission. We do not ask that it be regarded as void. We give full effect to the language of the plan: "Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Railroad Company . . ."

We simply say that the question whether the debtor can acquire the properties of the South Western on the terms, for the price set out in the plan by an acceptance of the offer of the Trustee, when that acceptance is authorized by a mere majority vote of the stockholders, is not a question which the Bankruptcy Court has exclusive jurisdiction to decide.

Our question is more nearly determined by the decision of this Court in the case of Central New England Ry. Co. v. Boston and Albany R. Co., 279 U. S. 415, cited by this Court in Thompson v. Texas Mexican Railway Company, 328 U. S. 134, at page 151. There the Court announced situations in which suits could be maintained in the State Court **after** action by the Commission. The language used by the Court immediately prior to its citation of the Central New England Ry. Co. case, supra, demonstrates that we have in our case a situation in which resort may be had to the State Court. That case involved an action against a railroad for breach of contract for lease of tracks of another railroad, wherein the defense was that defendant's contractual obligations were annulled by an order of the Interstate Commerce Commission under the Interstate Commerce Act, Section 1, Paragraphs 18-20, as amended by

the Transportation Act, 1920, Section 402 (49 U. S. C. A., Sections 1, 18-20). This action was held to be within the jurisdiction of the State Court because the plaintiff did not seek to have the order set aside, or ask that it be regarded as void, but contended only that the order did not have the effect of annulling the contract.

Another of the three cases referred to just hereinabove is: Seaboard Air Line R. Co. v. Daniel, Attorney General of South Carolina, ... U. S. ..., 68 Sup. Ct. Rep. 426. We confidently assert that the rationale of Mr. Justice Black's opinion in that case supports our position here—that the State Court has jurisdiction to determine whether the South Western could accept the offer authorized in the plan, and if so, by what measure of corporate authority. There the Seaboard Air Line Railroad Company sued in the South Carolina Supreme Court to enjoin the State's Attorney General from attempting to collect certain statutory penalties on the ground that the railroad company was authorized by an order of the Interstate Commerce Commission to operate within the State without complying with the State laws involved.

The Court said:

> "Although the jurisdiction of the South Carolina Supreme Court was there conceded, and is not here challenged, we think it appropriate to pass upon it. So far as the appellant's complaint is concerned, this is not the kind of action to 'set aside' a Commission's order of which the Federal District Courts have exclusive jurisdiction. While the action does involve the scope and validity of a Commission order, the relief requested in the complaint was the removal of an obstruction to the railroad's obedience to the order, not its suspension or annulment. Nor did the answer seek to have the enforcement of the

order enjoined, although it did question its validity as a basis for the relief sought in the complaint" (68 S. Ct., at page 429).

A fortiori, the State Court had jurisdiction of our action, for:

(1) We did not seek to "set aside" the Commission's order;

(2) Our action does not involve the scope and validity of a Commission order;

(3) Our action did not seek to have the enforcement of the order enjoined, nor did it question the validity of the order.

Our position is similar to that of the respondent in Central New England Ry. Co. v. Boston and Albany R. C., 279 U. S. 415, 421, stated thus by the Court:

> "Here, respondent does not ask that the order be set aside or that it be regarded as illegal and void: it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect, attributed to it by the petitioner, of annulling the contract. **The question is merely one of the legal effect of the order.** Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms." (Emphasis ours.)

Immediately following the language in Seaboard Air Line v. Daniel, hereinabove quoted, is:

> "The appellant was in this dilemma. Federal law required it to obey the order so long as it remained in effect; for a failure to abide by its terms serious federal penalties could be imposed on it. . . . On the other hand, South Carolina statutes provided

penalties for obedience to the order, which South Carolina officials asserted were enforceable against appellant despite the Commission's order. There was thus a bona fide controversy between appellant and the State officials over the validity of the order. Appellant wanted to obey the order; the State officials insisted appellant must obey their statutes instead. Federal District Courts have not been granted special jurisdiction to review and confirm orders of this Commission at the suit of railroads wishing to obey such orders. Under the foregoing circumstances appellant was not compelled to wait until some one who had standing to attack the Commission's order might decide to seek its annulment in a Federal District Court. It properly sought relief from a Court which could obtain jurisdiction of the parties whose refusal to recognize the order gave rise to its predicament. And the State Court then had power, because of the issues raised by the complaint and because of the relief required, to determine whether the order, properly interpreted, did exempt appellant from compliance with the state railroad corporation laws, and, if so, whether the Commission had transcended its statutory authority in making the order."

At the time Benton instituted his suit in the State Court (March 25, 1947), the situation was this:

On March 14, 1947, the President of South Western had stated in a letter to stockholders that a majority of them could authorize the Company to sell its properties—"accept the offer to purchase the physical properties of our Company contained in the plan of reorganization . . ." (R., page 11). Benton disagreed with this view of the law. There was a controversy between Benton and the officers of the Company, not over the validity of the Commission's order, but concerning the question of the quantum

of corporate authority necessary for a valid acceptance of the offer contained in it. Certainly under the Georgia Declaratory Judgment statute (Code of 1933 [Supp.], Section 110-1101 et seq.) the South Western could have asked the proper State Court of Georgia to determine the controversy, and declare the requisites of a valid acceptance. It did not take that action. Benton had to act, and act promptly.

We know of no statute which would have given him the right to proceed in the Bankruptcy Court, or any other Federal District Court, to review, confirm, interpret, or construe the Commission's order. He was not seeking to "set aside" the Commission's order. So, he entered the only Court which had jurisdiction at his behest to construe the effect of the order, to determine the requisites of a valid acceptance—the Superior Court of Bibb County, the County of the residence of the South Western, and some of its officers and Directors. He prayed that that Court enjoin the holding of the stockholders' meeting, set to be held on March 28, 1947, and that "if this Honorable Court should not restrain and enjoin the holding of the stockholders' meeting, as herein prayed, and that if at that meeting a mere majority of the stockholders should vote in favor of the acceptance of the plan and the resulting sale of all the railroad properties of the defendant corporation, that the officers and Directors of the defendant Company be restrained and enjoined from carrying such action of the stockholders into effect . . . ." (R., page 115).

Much has been said about the scope and breadth of the prayers of this action, but the Court will readily see that its sole purpose, as respects this particular question, was a judicial determination of the question of whether or not South Western could accept the offer made to it in the plan and sell its properties by the vote of a mere majority

of its stockholders. And, therefore, paraphrasing the language last quoted from the Daniel case: The State Courts had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the offer contained in the plan could be accepted by the South Western upon the vote of a mere majority of its stockholders.

The third of the three "recent cases" is Schwabacher v. U. S., 68 Sup. Ct. 958. There, Schwabacher and others had sued the United States of America, the Interstate Commerce Commission, and others, to set aside the Commission's order approving a merger of the Chesapeake & Ohio Railway Company, the Pere Marquette Railway Company (a Michigan Corporation), and the Allegheny Corporation. The plaintiffs (appellants) were owners of certain preferred stock of Pere Marquette. They contended that the merger (which was a voluntary merger) terminated the corporate existence, and under a clause of Pere Marquette's charter as construed by Michigan law, amounted to a "winding up" of the corporation, and that under Michigan law, they had the right to have their shares recognized on the basis of at least $172.50 each. The Commission found the market value per share ranged from $87.00 to $99.00, while the merger terms gave stocks in exchange which would have realized about $90.00 and $111.00 per share on the same dates. Plaintiffs dissented from the merger, but Michigan law provided no specific right or procedure for retirement and appraisal of the holdings of a stockholder dissenting from a railroad merger. When the application was filed with the Commission under Section 5 of the Interstate Commerce Act for approval of the merger, the plaintiffs intervened and asked that body to determine, recognize, and protect their asserted right to the full legal liquidation figure. The Commission approved the merger and the merger terms, finding them just and reasonable as to each class of stock-

holders. However, it disclaimed jurisdiction to pass upon the further claims of the plaintiffs (appellants), asserted on the basis of their interpretation of Michigan law.

The Supreme Court, in concluding the majority opinion, said:

> "We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the **requisite number of stockholders** and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. In making that determination, those rights are to be considered to the extent that they may affect intrinsic or market values. While the Commission has found that what the appellants are given in this plan is just and reasonable, the record indicates that it may have declined to consider these claims, even if they are found to have some effect on the intrinsic value of the stock, because it thought it lacked jurisdiction. Under these circumstances, we cannot be sure that in arriving at its conclusion that the plan was just and reasonable it did not exclude some factors that it should consider under the views set out in this opinion. We therefore reverse the judgment below and remand the case to the Commission for reconsideration under the principles herein expressed."
>
> Schwabacher v. U. S., 68 Sup. Ct. 958, at page 968.

Mr. Justice Reed took no part in the consideration or decision of this case. Mr. Justice Jackson delivered the majority opinion, joined by Justices Black, Douglas, Murphy and Rutledge; Mr. Justice Frankfurter dissented, joined by the Chief Justice and Mr. Justice Burton.

That the Schwabacher case does not decide the case at bar is shown by at least the following distinctions:

(1) The Court and Commission were there dealing with a voluntary merger of carriers under Section 5 of the Bankruptcy Act, which merger had been approved by the requisite number of stockholders under applicable State law;

(2) Appellants then had asked the Commission to determine their asserted right to the full liquidation figure;

(3) The Commission had disclaimed jurisdiction to pass upon appellants' claims based on their interpretation of Michigan law.

In the case at bar, neither before nor after the Commission, in a railroad reorganization case, had approved the plan of reorganization, did any person at interest ask the Commission to decide what measure of corporate authority on the part of South Western should determine whether the debtor could acquire South Western on the terms stated in the plan. The Commission was not asked to assume jurisdiction of that question, and did not assume it or disclaim it. It simply left it to the proper Courts to determine.

We submit that in the situation presented in the case at bar the following language of the majority in the Schwabacher case is apt: "Neither the Commission nor this Court can make a plenary and exclusive decision as to what the law of a State may be, for the function of declaring and interpreting its own law is left to each State of the Union" (68 Sup. Ct., at page 963). The Court did proceed to say then that the effect of a State law in relation to a Constitutional Act of Congress was for the Court to determine. But that question is not present here. This is not a voluntary merger of South Western and Central of Georgia. This is simply a case where the Commission has authorized

a carrier in reorganization to acquire the properties of another corporation, solvent, not in reorganization, without attempting to measure the legal requirements necessary to make that acquisition valid. We are not concerned with the question of whether the Commission under the Railroad Reorganization Act **could** have, in its approval of the plan, laid out such a measure. It did not. It was not asked to. Therefore, the question was left to the proper Court for determination.

> "The function of declaring and interpreting its own law, is left to each State of the Union."
>
> Schwabacher case, supra.

We promptly asked the State Court of Georgia to exercise that function. The Courts of that State should be permitted to continue to exercise that function.

One other "reorganization case" should be considered at this juncture. That is Continental Illinois National Bank & Trust Company of Chicago v. Chicago, Rock Island and Pacific Railway Company et al., 294 U. S. 648; 55 Sup. Ct. 595.

A mere reading of the facts of this case shows the difference between it and the case at bar. **There,** the debtor had outstanding collateral notes secured by mortgage bonds, a part of which were issued by it, part by a corporation forming a part of the system. The holders of the collateral notes were about to sell them. Those having interests adverse to the holders of these collateral notes set forth facts showing that unless the sale of the collateral was enjoined, it would be impossible to prepare and secure approval of a plan of reorganization. No plan of reorganization had been prepared. The bonds, which were about to be sold, were the property of the debtor, and therefore a part of the res in the hands

(d) South Western seeks to avail itself of this Act, and sell its properties by virtue of a resolution adopted by a mere majority of its stockholders;

(e) Minority stockholders seek to enjoin such sale;

(f) The Act of 1933, not having been accepted by the stockholders as an amendment to the charter of South Western by "proper corporate action", the resolution authorizing the sale is a mere nullity;

(g) The sale of the properties was properly enjoined.

The charter of the South Western is no stranger in this Court.

It was considered by the Court in the case of South Western Rail Road Company v. Georgia, 92 U. S. 676. It appeared from the record in that case that the South Western Rail Road Company, chartered in 1845, with an exemption from taxation beyond one-half of one per cent of its annual net income, was united with the Muscogee Rail Road Company, a Company entitled by its charter to a similar exemption. The union was effected under an Act of the Legislature approved March 4, 1856, the effect of which was to extinguish the Muscogee Company by its merger in the South Western. The Court, at page 677, said: "No new corporation was created by the union of the two companies; but the powers of the South Western were enlarged and all the rights, privileges, and property of the Muscogee Rail Road Company became the rights and property of the South Western. The exemption from taxation, which both companies enjoyed under their original charters, cannot, therefore, be withdrawn by the Legislature, and it is unaffected by the tax laws of 1874."

In the first place, this supports our argument that the Act of 1933 (Code of 1933, Sections 9-328 et seq.) does

of the Bankruptcy Court. An injunction, enjoining the sale, was granted by the Bankruptcy Court. The grant of the injunction was affirmed because "The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a Court of Bankruptcy as it is in a duly established Court of Equity" (294 U. S., at page 675).

The Court stated, at page 676, "An injunction may be issued in such circumstances for the purpose of protecting and preserving the jurisdiction of the Court until the object of the suit is accomplished and complete justice done between the parties."

The gist of the decision is shown at page 678, in the following language:

> "It is evident that the effect here wrought by the menace of impending sales of the collateral would seriously embarrass and probably prevent the formulation and consummation of a plan of reorganization."

That "gist" shows the utter difference between that case and the case at bar. There, no plan of reorganization had even been formulated. The properties about to be sold by the collateral note holders was property in the hands of the Trustee, and therefore in the hands of the Court. The use of that property was necessary in the formulation and consummation of the plan of reorganization.

> "The sale of the collateral securities from time to time during the progress of this consideration and work well might require such changes of detail in the plan, entailing new and perhaps difficult reconcilements of views among many and conflicting interests, as to forge an abandonment of the proceeding."

not affect the contractual rights of the South Western under its charter.

Secondly, it supports the averment which the respondent made in the State Court suit (R., page 113): "For over one hundred years it had been constantly contended by the officers and Directors of the South Western Rail Road Company that its charter is a contract between it and its stockholders, on the one hand, and the State of Georgia, on the other, which could not be amended by subsequent legislation so as to impair its obligation."

The charter was again before this Court in South Western Rail Road Company v. Wright, 116 U. S. 231, in which, while it was recognized that the exemption from taxation applied to that part of the road built under the original charter, the exemption did not apply to parts of the line built later.

We respectfully submit, therefore, that the Act of 1933 cannot be held to apply to the South Western Rail Road Company.

There are other questions made in the State Court suit which demonstrate that the State Court should be permitted to adjudicate the questions at issue between the respondents and the South Western, its officers and Directors.

One of the bases of the petition for injunction in the State Court was that the action of the Board of Directors, in disobeying the repeated and almost unanimous desires of the shareholders with respect to a sale of the South Western's properties, constituted a strong case of mismanagement (R., page 114).

The law of Georgia provides: "So long as the majority of stockholders confine themselves within the charter

How different is our case. The plan had been formulated, approved by the Commission and by the District Court. The plan recognized that the debtor might not acquire the South Western. The plan says to the debtor, "Acquire it if you can on terms most advantageous to you, but the method of acquisition is left to the Trustee." The question of how it can be acquired in no way defeats or impairs the jurisdiction of the Bankruptcy Court.

None of the other "reorganization cases" cited by the petitioners in either of the Courts below answers the prime question adversely to the contentions of the respondent here.

Those cases were:

In re New York, New Haven & Hartford Railroad, 147 Fed. (2d) 40;

Palmer, Trustee, v. Massachusetts, 308 U. S. 79;

Boston Terminal Co. v. Mutual Savings Bank Group Committee et al., 127 Fed. (2d) 707;

In re Pittsburgh Railway Co., 155 Fed. (2d) 477.

If we are correct in our contention, that the stated question has not been decided adversely to us in any "reorganization case," then—what of the general law?

We realize that in addition to the statutory exception emphasized in Section 265 of the Judicial Code, there were exceptions which the Courts have engrafted upon the section. Among these exceptions is (as expressed in a recent Law Review article), "the res exception which allowed injunctions against State Court proceedings which sought to deal with a res under the jurisdiction of the Federal Court" (California Law Review, December, 1947, Vol. 35, No. 4, pages 545, 546, et seq.).

This exception was treated by the Court in Toucey v. New York Life Insurance Company, 314 U. S. 118, 62 S. Ct. 139, as follows:

"This brings us to the applications of Section 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470, holds that the Court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other. Taylor v. Carryl, 20 How. 583, 597, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749. See Kline v. Burke Construction Co., 260 U. S. 226, 235, 43 S. Ct. 79, 83, 67 L. Ed. 226, 24 A. L. R. 1077: 'The rank and authority of the (federal and state) courts are equal; but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of other jurisdiction is a rule of right and of law based upon necessity, **and where the necessity, actual or potential, does not exist, the rule does not apply.** Since that necessity does not exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process. The reciprocal doctrine of the res cases is but an application of the reason underlying the Act. Contest between the representatives of two distinct judicial systems **over the same physical property** would give rise to actual physical friction. The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction

by a federal court to restrain state proceedings seeking to interfere with **property** in the custody of the court. Farmers Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U. S. 51, 60, 20 S. Ct. 564, 568, 44 L. Ed. 667; Kline v. Burke Construction Co., 260 U. S. 226, 229, 235, 43 S. Ct. 79, 81, 83, 67 L. Ed. 226, 24 A. L. R. 1077; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 88, 89, 43 S. Ct. 480, 67 L. Ed. 871; see Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 359-66. And where a state court first acquired control of the res, the federal courts are disabled from exercising any power over it, by injunction or otherwise. Palmer v. Texas, 212 U. S. 118, 29 S. Ct. 230, 53 L. Ed. 435."

Toucey v. New York Life Insurance Co., 314 U. S., at pages 134-136 (62 S. Ct., at pages 114-145).

In our brief in the Circuit Court of Appeals we stated, as the first of the main questions before that Court:

"Under the facts and the law applicable thereto, did the Bankruptcy Court have exclusive jurisdiction to determine whether the properties of South Western could be acquired by the Central on the terms set forth in the plan by the mere majority vote of the stockholders of South Western?"

What the Circuit Court of Appeals did in the majority opinion was to answer the question hereinabove stated in the negative. In so doing, it necessarily held that neither the statutory exception nor the **res** exception applied to the facts of the case. We submit that it was correct in so holding. In determining the correctness of the ruling, it is first necessary to determine what is the **res** with which we are concerned. The **res** is the fee-simple title to properties leased to the Central of Georgia Railway Company

by the South Western Rail Road. The Interstate Commerce Commission in the plan authorized the debtor (Central of Georgia) to acquire those properties if they could be acquired on the terms set forth in the plan. Thus, the Circuit Court of Appeals described the res involved:

"Because the debtor's trustee has actual possession under its lease of certain tangible property of the South Western Railroad Company, the trustee claims to be in possession of all the property in controversy. We do not concur in this contention. The debtor is seeking (not to enforce a lien upon tangible property as in Warren v. Palmer, 310 U. S. 132, but) to acquire the incorporeal reversionary interest of its lessor, which arose by operation of law when the leasehold was carved out of the free-simple title. This is a vested future interest to commence in possession after the determination of the lease. The lessee is not disputing the lessor's title, but is seeking to acquire it, and is claiming that the bankruptcy court is administering this intangible asset. The fallacy in the argument is this: In the case of a tangible res, there can be possession in fact as well as in contemplation of law; but in the case of something intangible, possession is purely a legal concept that manifests itself only through recognition of legal consequences. So far as pertinent here, the legal consequences of a debtor's possession of a tangible asset at the time of his bankruptcy are that his trustee in bankruptcy succeeds to the debtor's possession, and that the bankruptcy court, acquiring possession thereby, has summary jurisdiction in rem to adjudicate adverse claims respecting the asset. Therefore, for practical reasons, the law attaches to the ownership of intangible property the legal consequences of possession of a tangible res. Thus in this case the law limits the possession of the

lessee to the duration of the lease, while it attaches to ownership of the reversion in fee the legal consequences of possession. Such reversion, not being owned by Central at the time its petition for reorganization was filed, is in legal contemplation not now in possession of the bankruptcy court; and, since the law attributes to its mere ownership the legal consequences of possession, the bankruptcy court has no jurisdiction in rem of said reversionary interest." (Printed Opinion, pages 9-10.)

The utter difference between the majority and minority opinions below is this: The majority opinion treated the res as that "incorporeal reversionary interest of the (its) lessor, which arose by operation of law when the leasehold was carved out of the fee simple title" (page 188)—the lessor's title which added to the leasehold estate constituted the entire fee simple title. That is the res which the Commission had authorized the Debtor in the plan to acquire if it could; that is the res for which the Debtor was authorized to make to the South Western an offer. The minority opinion treated the res as "the reorganization proceeding, including its controversies and questions and the plan it was instituted to bring about" (R., page 199).

We most respectfully submit that the history of the res exception demonstrates the correctness of the opinion of the majority below. When the Courts, in engrafting the res exception upon Section 265, spoke of "a res" in the possession of a Court, they meant "a thing"; "physical property," and not a judicial proceeding.

In the Toucey case, supra, at page 135, the Court recognizes a res as physical property by saying: "Contest between the representatives of two distinct judicial systems over the **same physical property** would give rise to actual

physical friction." (Emphasis ours.) And immediately following the language just quoted is: "The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction by a federal Court to restrain State proceedings seeking to interfere **with property** in the custody of the Court." (Emphasis ours.)

The first of the line of cases cited by the Court in the Toucey case as holding "that the court, whether Federal or State, which first takes possession of a res withdraws **the property** from the reach of the other" (emphasis ours) is Hagan v. Lucas, 10 Peters 400. There the res was certain slaves. The next is Taylor v. Carryl, 20 Howard 583, where the res was a vessel. Taylor v. Carryl was followed by and in Freeman v. Howe, 24 Howard 450. There the res was certain railroad cars. The Court said:

> "In the case of Taylor et al. v. Carryl (20 Howard 583) the majority of the Court were of the opinion that, according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, when the one was paramount to the other, **but upon the question, which jurisdiction had first attached by the seizure and custody of the** PROPERTY **under its** process. This principle is equally applicable to the case of **property** attached under mesne process, for the purpose of awaiting the final judgment, as in the case of **property** seized in admiralty, and the proceedings **in rem**" (at page 451. Emphasis ours, except as to the phrase **in rem**).

In Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79, the Court refused to apply the res exception. Of

that case, we said in our brief in the Circuit Court of Appeals:

"The Burke Construction Company brought an action at law against Kline and others in the United States District Court for the Western District of Arkansas. The jurisdiction of that Court was invoked, upon the ground of diversity of citizenship. The action was for a breach of contract, whereby the Construction Company had engaged to pave certain streets in Texarkana, and a trial was had which resulted in a mistrial.

"Subsequently to the commencement of the foregoing action, Kline and others instituted a suit in equity against Burke Construction Company in a State Chancery Court of the State of Arkansas, upon the same contract, joining as defendants the sureties on the bond which Burke Construction Company had given for faithful performance of the contract. The bill in the latter suit alleged that the Construction Company had abandoned its contract and judgment was sought against the sureties as well as against the Burke Company. In the action brought by the Burke Company, Kline and others filed an answer and cross complaint. In the equity suit, Burke filed an answer and cross complaint. Thus the two cases presented substantially the same issues, the only difference being that resulting from the addition of the sureties as parties defendant in the equity suit. Both actions were in personam. The equity suit was removed to the United States Court upon the petition of the Burke Company on the ground of diversity of citizenship and upon the further ground that the question involved was a Federal question. Kline and others moved to remand. The District Court sustained the motion, and the equity suit was thereupon remanded to the State Court.

"After a mistrial of the action at law in the United States Court, the Burke Company filed a bill of complaint as a dependent bill to its action at law, by which it sought to enjoin Kline and others from further prosecuting the suit in equity in the State Chancery Court.

"The United States District Court denied the injunction and an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. That Court reversed the decision of the District Court and remanded the case with instructions to issue an injunction against the prosecution of the suit in equity in the State Court. From that decree, the case came to the Supreme Court upon writ of certiorari. The Supreme Court reversed the decree of the Circuit Court of Appeals.

"In other words, the Supreme Court held that the District Court was right in having denied the injunction. The Supreme Court decided that the District Court was right in refusing to enjoin Kline and others from further prosecuting their suit in the State Court. The reasons which prompted the Supreme Court so to hold are important here. Those reasons are shown at page 235 of the official opinion, page 83 of 43 Supreme Court Reporter, as follows:

"'The well established rule, to which we have referred, that where the action is one in rem, that Court—whether State or Federal—which first acquired the jurisdiction, draws to itself the exclusive authority to control and dispose of the res, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective Courts are of equal rank . . . The rank and authority of the courts are equal, but both Courts cannot possess or control the same thing at the same time, and any attempt to

do so would result in unseemly conflict. The rule, therefore, that the Court first acquiring jurisdiction, shall proceed without interference from a Court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions in rem, and does not in actions in personam, involving questions of personal liability only, the rule applies in the former, but does not apply in the latter.'

"Let us apply that language to the facts of the case at bar.

"There is no res in the possession of either Court (except as the lease may give possession). The action in the State Court was not an action in rem. It was purely an action in personam. While the petition in the State Court action did not seek any money judgment in personam, against the officers and Directors of the South Western, it did seek a decree which would control their personal and official actions. The res—the physical properties of the South Western Rail Road—were not and are not in the possession or control of either Court, State or Federal.

"The question which remained to be adjudicated after the stockholders' meeting of March 28 had been held, was simply this: Have the officers and Directors of the South Western Rail Road the right to sell its properties upon a mere majority vote of its stockholders? The action was one in personam, and not one in rem, and no necessity, actual or potential, exists which requires the application of an injunction by a Federal Court to protect any res in its possession or control. Neither the South Western Railroad Company, nor its officers, nor its Directors, nor its stockholders, are in the possession or control of the Dis-

trict Court of the United States for the Southern District of Georgia."

In Farmers Loan & Trust Company v. Lake Street Elevated R. Co., 177 U. S. 51, the res was the property of The Lake Street Elevated Railroad Company. There were two conflicting mortgage foreclosures as to this physical property.

In Lion Bonding and Surety Company v. Karatz, 262 U. S. 77, 43 S. Ct. 480, the res was the property of Lion Bonding and Surety Company. In the opinion in the Toucey case, supra, the Court referred to pages 88 and 89 of this opinion. The language there is:

> "Where a Court of competent jurisdiction has, by appropriate proceedings, **taken property into its possession** through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. Wabash Railroad v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182 . . . Compare Oklahoma v. Texas, 258 U. S. 574, 581 . . . Possession of the res disables other Courts of coordinate jurisdiction from exercising any power over it. Farmers Loan & Trust Company v. Lake Street Elevated R. R. Co., 177 U. S. 51, 61 . . . The Court which first acquired jurisdiction through **possession of the property** is vested, where it holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other Court to interfere with such possession and jurisdiction. Palmer v. Texas, 212 U. S. 118, 126 . . ." (Emphasis ours.)

So in all cases cited by the Court in the opinion in the Toucey case in support of **"the res exception"** there was

tangible physical property in the prior possession of the Court held to have prior jurisdiction.

At page 22 of the opinion in the case at bar the dissenting Judge stated:

> "He (the District Judge) said, with complete clarity, too, that under the controlling decisions of the Supreme Court of the United States, the res of which the Reorganization Court has exclusive jurisdiction is not merely, or even mainly, the physical properties of the debtor railroad. It is the **proceeding for its reorganization,** including all claims, issues and controversies affecting or relating to **the plan of reorganization, the prime res in the proceeding,** its formulation, acceptance and carrying out."

The Court, in its majority opinion, did not, as we read its opinion, hold that the res was "the physical properties of the debtor railroad." The physical properties which the plan authorized the debtor railroad to acquire, if it could, were those of the South Western Rail Road. As we read the majority opinion, it decided the res to be "the incorporeal reversionary interest of the (its) lessor, which arose by operation of law when the leasehold was carved out of the fee-simple title" (Opinion, page 9). It decided the res to be reversionary interest necessary to be acquired by the debtor in order for the debtor to acquire legally the full fee-simple title to properties leased to the debtor by the South Western Rail Road. This reversionary interest was not in the possession of the Bankruptcy Court. The fee-simple title to the properties of the South Western was not in the possession of the Bankruptcy Court. The physical properties of the South Western were not in the possession of the Bankruptcy Court except in so far as the lease gave it possession. The Bankruptcy Court had possession of a leasehold interest in the properties, **not** the properties; **not**

the fee-simple title to the properties, **not** the reversionary interest in the properties which, plus the leasehold, makes up the fee-simple title. We respectfully submit that the dissenting opinion totally overlooks the fact that "the *res* exception" is based on the prior possession by the Federal Court of **physical property**.

As we read the majority opinion of the Circuit Court of Appeals, it went no further than to hold that the State Court had jurisdiction to determine the controversy. It did not deal with the questions of law at issue before the State Court at the time of the Federal Court injunction, the principal one of which was: COULD THE SOUTH WESTERN ACCEPT THE OFFER MADE IN THE PLAN BY A MERE MAJORITY VOTE OF ITS STOCKHOLDERS?

The dissenting opinion (R., page 194) states as what it considered the third question to be: "Was the District Judge right in deciding that unanimous consent of South Western's stockholders was not necessary, that majority consent was sufficient?"

The only answer the dissenting opinion makes to that question is in the last few lines thereof, where, without any citation of authority whatsoever, the dissenting Judge stated that the determination of the Federal Court favorable to the acceptance of the plan was right (R., page 204). There was no citation of authority, although the **State Court Judge** had determined this question of State law to the contrary.

We cannot conceive how this question can possibly be before this Court at this stage of the case. Nevertheless, we summarize briefly what we have said about it in the Courts below:

1. The charter of the South Western Rail Road Company, granted by the General Assembly of Georgia, is a

contract between the State and the Company, and between the State and the stockholders of the Company.

2. The obligations of that contract cannot be impaired by subsequent legislation (Dartmouth College case, 4 Wheat. 518, 4 L. Ed. 629).

3. Laws which subsist at the time and place of making a contract, enter into and form a part of it as if they were expressly incorporated in the contract. The obligation of a contract is measured by the standard of the laws in force at the time it was entered into. Its performance is to be regulated by the terms and rules which they prescribe (12 American Jurisprudence, page 14, Constitutional Law, Section 386, citing many Supreme Court cases, among others; W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 Sup. Ct. 55, holding:

> "To know the obligation of a contract, we look to the laws in force at its making" [295 U. S., at page 60]).

4. As the law of Georgia stood in 1845:

> "A railroad corporation cannot, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease."
>
> Singleton v. South Western Railroad, 70 Ga. 464.

5. The Act of 1933 (Code of 1933, Sections 94-328, 94-329, App. to petition, page 6) permitted the South Western **only so far as the State of Georgia** was concerned to alienate its properties. It did not affect the contractual rights of the stockholders under the charter.

> Mayor etc. of Knoxville v. Knoxville & O. R. Co., 22 Fed. 758 (appeal dismissed 136 U. S. 642);
> Alexander v. A. & W. P. R. Co., 108 Ga. 151.

6. The latter case is decisive of the question of State law controlling here, was so held to be by the State Court Judge and it and his decision are binding on the Federal Courts.

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817;

Ruhlin et al. v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860;

Fidelity Union Trust Co. et al. v. Field, 311 U. S. 169, 61 Sup. Ct. 176, holding:

> An intermediate State Court, in declaring and applying the State law, is acting as an organ of the State, and its determination, in absence of more convincing evidence of what State law is, should be followed by a Federal Court in deciding a State question.

Huron Holding Corporation et al. v. Lincoln Mine Operating Company, 312 U. S. 183, 61 Sup. Ct. 513, holding:

> In determining what is the law of a State, Federal Court may look to decisions of lower State Court as well as those of highest Court of State.

7. An analysis of Alexander v. A. & W. P. R. Co., 108 Ga. 151:

(a) The charter of the Atlanta and West Point R. R. Co. consisted of special Acts of the General Assembly of Georgia, enacted prior to the passage of the General Railroad Incorporation Law;

(b) Under its charter, the A. & W. P. had no authority to build a belt railroad from any point on its road to any other railroad;

(c) The General Railroad Incorporation Law was enacted, which provided that any railroad company theretofore created might, when "authorized by proper corporate action", amend its charter so as to acquire the corporate powers embraced in the general law, which included the right to build the branch railroad in question;

(d) The A. & W. P. sought so to amend its charter. This action was authorized only by a majority of the stockholders and not by unanimous consent;

(e) A number of the minority stockholders of A. & W. P. filed an equitable petition to enjoin the building of this belt or branch line as authorized by the amendment to the charter;

(f) The application for the amendment was a "mere nullity" (h. n. 3), having been based on the resolution of a mere majority of the stockholders which was not "proper corporate action" (h. n. 2);

(g) The building of the line was enjoined.

8. The controlling parallel of the Alexander case to the case as decided by the State Court Judge is:

(a) The charter of South Western consisted of special Act of the General Assembly of Georgia enacted prior to the passage of the General Railroad Incorporation Law;

(b) Under this charter the South Western had no authority to sell its railroad properties (Singleton v. South Western, 70 Ga. 464 [2]);

(c) An Act of the General Assembly of Georgia was enacted in 1933 (Code of 1933, Sections 94-328, 329) which **authorized** a railroad corporation under certain conditions to sell or lease its property, rights, and franchises, upon such terms as may be agreed upon by the Board of Directors and assented to by the holders of a majority of the stock;

powers, a Court of Equity will require a strong case of mismanagement or fraud before it will interfere with the internal management of affairs of a corporation" (Code of 1933, Section 22-710).

The State Court Judge, in his order granting the interlocutory injunction, denied the relief sought in so far as it was based on the ground of alleged mismanagement (R., page 21), but despite this denial by the Judge of the interlocutory injunction based on this ground, we are entitled under the Georgia law to a trial by jury on this issue of fact, provided that, in the opinion of the Courts, there is sufficient evidence of mismanagement to raise a question of fact.

> "On the hearing of an application for an interlocutory injunction, the Judge should not undertake to finally adjudicate disputed issues of fact, but should only determine whether the same authorizes the interlocutory relief sought."
>
> **City of Waycross et al. v. Waycross Savings and Trust Company et al., 146 Ga. 68 (3);**
> **Florida Central Railroad Company v. Cherokee Sawmill, 137 Ga. 815 (6).**

Under the Georgia law, the Judge of the Superior Court having jurisdiction of the person of the defendant, may decide whether or not an interlocutory injunction shall be granted. Whether or not a permanent injunction shall be granted is determined after a jury has passed on questions of fact.

Bono and Brother v. Orolow, 147 Ga. 388.

We respectfully submit that questions regarding the internal management of the affairs of a corporation created by a State should be determined by the Courts of that State. This is true the most particularly in the light of

the allegation of the petition in the State Court (R., page 110): "Petitioner is advised and so charges that the present management of the Central of Georgia Railway has, for the last week, had out over Georgia representatives actively soliciting votes for the ratification of the plan."

The effect of this allegation and any proof that might be submitted in connection with it, has not yet been passed upon by a jury in the State Court.

With respect to it, the Federal District Court said, in its finding of fact No. 25:

> "With reference to the contention that Samuel L. Varnedoe, a stock and bond broker, solicited proxies for 6,269 shares of South Western stock, which were voted in favor of the acceptance of the plan at the meeting of stockholders of March 28, 1947, and that it was illegal to solicit proxies, and that if these solicited proxies were thrown out, a majority of stockholders would not have voted for the acceptance of the plan; it appears from the undisputed evidence that proxies for 4,990 shares of stock out of the 6,269 shares were not solicited by Mr. Varnedoe; that the holders of these 4,990 shares were all clients of his to whom he had sold the stock, and that they voluntarily and of their own motion requested him to represent their stock. He admitted that the proxies for the other 1,279 shares of stock had been solicited by him" (R., page 54).

In the conclusions of law in the Federal Court, the District Judge concluded with respect to this feature:

> "It is claimed in the answer of the respondent that of the 30,137 shares of stock which were voted at the meeting of South Western stockholders, that 6,269 shares were solicited by Samuel L. Varnedoe, a broker,

and that the solicitation of proxies from stockholders was unlawful, and if these shares which were unlawfully solicited are thrown out, that there would have been voted for the acceptance of the plan only 23,868 shares, which is short of a majority of the total number of shares of stock. The only law which was cited to the Court which bore upon this question is sub-section (p) of Section 77 of the Bankruptcy Act, but this Section of the Bankruptcy Act only prohibits the solicitation of proxies from any creditors or shareholders of the debtors. We do not think that there is anything in this statute which prohibits the solicitation of proxies from the shareholders of the South Western Railroad Company. The plan was not submitted by the Commission to the stockholders of the South Western to be voted on. It was submitted to the South Western Company itself, and the Directors of the South Western resolved to accept the plan, subject to the assent of a majority of their stockholders. The only prohibition against soliciting proxies is from the shareholders of the debtor. Although the South Western may be technically a creditor, its stockholders are not creditors of the debtor within sub-section (p) of Section 77; the stockholders are not agents of the Corporation, do not own the property of the Corporation, cannot contract on its behalf, are not liable for its debts, and there is no relation of debtor and creditor and the stockholders are wholly distinct from the Corporation. Cook on Stockholders, Sections 267, 271 and 709. Moreover, Mr. Varnedoe testified, and his testimony is undisputed, that of the 6,269 shares voted by him as proxy, 4,990 shares of stock which he voted as proxy were not solicited by him at all, but that as he was a large dealer in this stock and had sold a large amount of it to his clients, that when the time came to vote

on the plan they consulted him and asked his advice and requested him to vote for their stock for them. The balance of 1,279 shares of stock which he voted was solicited by him" .(Conclusion of Law No. 22, R., pages 68-9).

As we read the decision of the Circuit Court of Appeals, this question was not there passed upon.

In the District Court, in conclusion of law No. 3, the Court said:

> "South Western is a party to the re-organization proceedings and to the plan for all purposes connected with the plan" (R., page 56).

Despite this conclusion, the District Court, in conclusion of law No. 22 (R., page 68), refused to condemn the solicitation of proxies from shareholders of the South Western, saying that sub-Section (p) of Section 77 of the Bankruptcy Act only prohibits the solicitation of proxies from any creditors or shareholders of the debtor.

Part of sub-Section (p) of 77 appears in the Appendix to this brief.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed, in order that all these questions may be threshed out in the State Courts of Georgia.

Respectfully submitted,

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APPENDIX.

U. S. C. A., Title 11, Section 205 (p).

(p) It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal Court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including

provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission after hearing by order authorizes such solicitation, use, employment, or action, . . .